

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MARTHA ORTEGA**

Claimant

VS.

**VIA CHRISTI REGIONAL MEDICAL  
CENTER, INC.**

Self-Insured Respondent

Docket No. 1,033,508

**ORDER**

**STATEMENT OF THE CASE**

Respondent requested review of the October 3, 2008, Award entered by Administrative Law Judge Thomas Klein. The Board heard oral argument on February 20, 2009. Steven R. Wilson, of Wichita, Kansas, appeared for claimant. Joseph C. McMillan, of Lenexa, Kansas, appeared for the self-insured respondent.

The Administrative Law Judge (ALJ) found the opinions of Dr. George Fluter to be more realistic than those of Dr. J. Mark Melhorn and adopted Dr. Fluter's impairment ratings of 5 percent to the whole body for claimant's neck injury, 13 percent for the right upper extremity, and 3 percent for the left upper extremity. The ALJ also found that based on the opinions of Dr. Fluter, claimant is permanently and totally disabled.

The Board has considered the record and adopted the stipulations listed in the Award. During oral argument to the Board, the parties agreed that for computation purposes, claimant's date of accident should be her last day worked, November 23, 2007.<sup>1</sup> The parties also agreed that respondent is self insured.<sup>2</sup>

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<sup>1</sup> See ALJ's Award (Oct. 3, 2008), Stipulation No. 2.

<sup>2</sup> See ALJ'S Award (Oct. 3, 2008), Stipulation No. 9.

### ISSUES

Respondent asserts that claimant is not permanently and totally disabled. Respondent also contends that claimant is not entitled to a work disability because she did not prove that she suffered a compensable injury to her neck. Instead, respondent argues that claimant is only entitled to two separate scheduled injuries to her bilateral upper extremities. In the event the Board finds that claimant suffered a compensable injury to her neck, respondent argues that she is not entitled to a work disability because she did not make a good faith effort to find employment. If the Board finds that claimant is entitled to a work disability, respondent requests that a wage be imputed based upon claimant's post-accident ability to earn wages consistent with the opinions of Karen Terrill.

Claimant contends that the Award of the ALJ should be affirmed.

The issue for the Board's review is: What is the nature and extent of claimant's disability?

### FINDINGS OF FACT

Claimant was 52 years old at the time of the regular hearing. She had been employed by respondent in the laundry room for 16 years until November 23, 2007. She testified that over the course of a day, she used her hands and arms hundreds of times to push, pull, fold and reach. In June 2006, she began experiencing pain in her right shoulder. She continued to work, but the pain got worse. In either August or September 2006, she reported her condition to her supervisor and was sent to Dr. Ben Norman on September 25, 2006. Dr. Norman told her he thought she had arthritis and told her to see her family physician. He recommended she be tested for arthritis. On October 16, claimant saw Vicki Reed, a physician's assistant at Family Medicine East, who told her that her problems were work related. Claimant was given restrictions of no reaching above shoulder level; no lifting, pulling or pushing over five pounds; and limit repetitive movement of the right shoulder. She testified that by that time, she had also started having pain in her left shoulder.

She continued to see both Ms. Reed and Dr. Norris until February 2007. Ms. Reed prescribed physical therapy. On February 23, 2007, Dr. Norris released her from treatment with a 20 pound lifting restriction. Claimant testified that she was told by respondent that it could not accommodate her restrictions, and she was off work until March 8, 2007. On that date, respondent returned her to work in an accommodated job. She continued to do that job until approximately November 23, 2007. She was then notified by respondent that it could no longer accommodate her. She received a letter on January 8, 2008, saying she was terminated because she could not perform the essential functions of a laundry associate.

On March 15, 2007, claimant was seen by Dr. George Fluter at the request of her attorney. She complained of pain in both shoulders, elbows, hands, fingers and thumbs. She also indicated that she had pain in her neck and upper back. She brought an interpreter with her, but Dr. Fluter testified that he found claimant to be reasonably fluent in English. Upon examination, Dr. Fluter found that claimant had swollen and painful joints. He recommended she restrict lifting, carrying, pushing, and pulling to 10 pounds occasionally and negligible weight frequently; activities at or above shoulder level using each arm to an occasional basis; repetitive flexion, extension, pronation, and supination of each elbow to an occasional basis; repetitive flexion and extension of each wrist to an occasional basis, and repetitive grasp using each hand to an occasional basis.

After this initial examination, Dr. Fluter was authorized to be claimant's treating physician. He began treating her in May 2007. At that time, his assessment was that claimant had bilateral shoulder pain, bilateral upper extremity pain, bilateral hand and thumb pain, possible carpal tunnel syndrome, and possible bilateral upper extremity tendonitis and arthritis. He made no assessment relative to her cervical spine. He referred claimant to have an EMG. He also began her on medication, wrist splints, tennis elbow straps, and referred her to physical therapy. He continued her restrictions. The EMG showed that claimant had mild right-sided carpal tunnel syndrome. No other abnormalities were found. There was no evidence of radiculopathy from the cervical spine.

By July 2007, claimant reported she had been getting some benefit from the physical therapy, although she rated her pain at a 5 on a scale of 0 to 10. Dr. Fluter referred her to Dr. Melhorn, an orthopedic hand specialist. By September 2007, claimant was experiencing increasing pain in her upper extremities and neck. Dr. Fluter testified that although he did not find muscle spasm in claimant's cervical spine, he found taut muscular bands.

Dr. Fluter last saw claimant on October 10, 2007. She was still complaining of pain in her neck, shoulders, and hands but said her elbow and wrist pain had improved. Dr. Fluter's assessment at that time was bilateral upper extremity pain; bilateral thumb, hand, and wrist pain; possible bilateral upper extremity tendonitis and arthritis, mild right carpal tunnel syndrome, and myofascial pain affecting the neck and upper back. He said he believed that her myofascial pain was related to repetitive microscopic trauma to the soft tissues.

Dr. Fluter prepared a rating report on November 12, 2007, in which he opined that claimant had reached maximum medical improvement (MMI). Dr. Fluter opined that based upon the available information, to a reasonable degree of medical probability, there was a causal contributory relationship between claimant's current condition and her work activities.

Using the *AMA Guides*,<sup>3</sup> he rated claimant as having a 5 percent whole body impairment in accordance with cervicothoracic DRE Category II. For claimant's mild degree of median nerve entrapment at the right wrist, he rated her impairment at 10 percent to the right upper extremity at the level of the wrist. Although not specifically addressed in the *AMA Guides*, he found that claimant had a 3 percent permanent partial impairment to the right upper extremity and a 3 percent permanent partial impairment to the left upper extremity for tendonitis and arthritis conditions. Using the Combined Values Chart, he calculated claimant's impairment to her right upper extremity to be 13 percent and her impairment to the left upper extremity to be 3 percent. Also using the Combined Values Chart, he found claimant had a whole body impairment of 8 percent related to her right upper extremity and a whole body impairment of 2 percent related to her left upper extremity. Combining all her whole body impairments gave her a total permanent partial impairment to the whole body of 15 percent.

Dr. Flutter continued claimant's past restrictions. Although none of the restrictions are specifically related to her cervical spine, he stated that avoiding or restricting activities at or above shoulder level would have some impact on her cervical spine because the shoulder girdle musculature is structurally part of the neck.

Dr. Flutter reviewed a task list prepared by Jerry Hardin. Of the 8 tasks on the list, he opined that claimant would be unable to perform 7 for a task loss of 87.5 percent. Dr. Flutter testified that considering claimant's background, education, age, and restrictions, he would find it hard to believe that she would be able to find a job within her restrictions.

Dr. J. Mark Melhorn, an orthopedic surgeon who specializes in hands and upper extremities, first saw claimant in July 2007, at the referral of Dr. Flutter. She filled out a pain diagram on July 22, 2007, indicating areas of pain only in her bilateral thumbs. She described the pain as "pins and needles." She said her pain level was 4 on a 0-10 scale. She did not mark any areas of pain in her elbows, shoulders, neck or upper back. Upon examination, Dr. Melhorn found she had tenderness with regard to her hands and thumbs on both the right and left. She had some tenderness at the base of the thumbs which would be suggestive of some early age-related arthritis. There was a little tenderness in the forearm, but the remainder of her examination was normal. The range of motion of her shoulders was equal and symmetrical without apprehension, impingement, thoracic outlet or crepitus. He diagnosed her with right carpal tunnel syndrome, painful right and left upper extremity, neuropraxia, and CMC osteoarthritis right and left thumb. He recommended a modified work pattern with task rotation and suggested she heat and cool with exercise and stretching.

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<sup>3</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Dr. Melhorn next saw claimant on July 31. Her examination was essentially the same except for carpal/metacarpal joint prominence with regard to the thumb. Because she claimed increasing symptoms in her shoulder and neck, x-rays of the shoulder and neck were obtained. The x-ray results were appropriate for her age. Dr. Melhorn diagnosed her with right and left de Quervain's tendonitis and painful right and left elbows, shoulders and neck. Claimant was given injections in her thumbs. Dr. Melhorn did not recommend any other treatment for her elbows, shoulder or neck because his clinical examination did not support the need for treatment of those areas.

Dr. Melhorn next saw claimant on August 21, 2007. She reported to him that the injections seems to provide her some temporary relief, and her symptoms were less intense. He repeated the injections in her thumbs.

Dr. Melhorn again saw claimant on September 12, 2007. She indicated that she was doing better at work and that she was now passing trays and medications at the hospital. She still complained of some discomfort in both upper extremities. Dr. Melhorn performed an examination, the majority of which was normal. Dr. Melhorn again repeated the injections to the thumbs. Although claimant complained of some discomfort in her shoulders and neck, the areas of tenderness she complained of were not consistent from visit to visit. Dr. Melhorn did not find any evidence of cervical disease or nerve entrapment in the neck or shoulder area.

Dr. Melhorn next saw claimant on October 5, 2007. She still complained of diffuse pain in the upper extremities. Dr. Melhorn again examined claimant and continued to diagnose her with de Quervain's tendonitis and mild carpal tunnel with regard to the right wrist. Dr. Melhorn told her that if her symptoms persisted, he thought she was a reasonable candidate for a de Quervain's release and probably a right carpal tunnel release, but claimant preferred a nonsurgical approach. Because she did not opt to have surgery, he found she was at MMI.

Dr. Melhorn believed that claimant had a permanent partial impairment as a result of her work at respondent. Based on the *AMA Guides*, he rated claimant as having a 5.3 percent permanent partial impairment to both the right and left forearm for de Quervain's tendonitis and mild carpal tunnel. In his opinion, claimant had no permanent partial impairment in regard to her shoulders or neck because her clinical examination was essentially normal, the x-rays were normal, and her nerve conduction studies did not indicate symptoms above the level of the forearm/wrist.

Dr. Melhorn reviewed the task list prepared by Mr. Hardin as well as a job description of the laundry associate position at respondent. He opined that claimant could perform the activities listed up to 40 hours per week. He said that based on the way the tasks were described, specific task rotation would be occurring. He opined that claimant could lift up to 50 pounds in a combined lift using both hands, but that needed to occur six

hours or less in an 8-hour workday. The other two hours needed to be alternate work that would not involve lifting at that level. She may do pushing and pulling activities.

Jerry Hardin, a personnel/human resource consultant, met with claimant and an interpreter on January 7, 2008. He said that claimant speaks limited English and that without an interpreter he would not have been able to complete the interview. Together, they compiled a list of 8 tasks that claimant performed over the 15-year period before her accident.

Using Dr. Flutter's restrictions, Mr. Hardin opined that claimant has a 100 percent wage loss and is essentially and realistically unemployable. In coming to this conclusion, he took into consideration her age; education; training; past work experience; limited ability to read, write, speak and understand English; her limited work history and transferable skills; and her work restrictions. Claimant completed the 12th grade in 1972 in Mexico. She took an English class in 1981 but did not complete it. She had no other formal education or training.

Mr. Hardin said he could not give an opinion as to what wage claimant could expect to earn because she cannot work and will not be hired with her restrictions and her other problems of limited education, training, work experience, and English. He did not think claimant could even get a job as a greeter for Walmart because she is too limited in her English skills.

Karen Terrill, a rehabilitation consultant, conducted an initial interview with claimant on March 11, 2008, and a subsequent interview three weeks later, at the request of respondent to provide information relating to her loss of wage earning ability. When she met with claimant, an interpreter was present.

Claimant told Ms. Terrill that she graduated from high school in Mexico in 1972. He immigrated to the United States in 1980 and in 1981 took English as a Second Language courses. She attended a 6-month citizenship class, took the test, and became a United States citizen. Ms. Terrill said that claimant has no knowledge of computers and does not type. Claimant indicated she is able to understand and speak English fairly well but was apprehensive about the misuse of a word. She can read a newspaper and has good math skills.

Claimant had not returned to work since her injury. She had not registered with the Work Force Development Center.

Ms. Terrill testified that when looking at Dr. Melhorn's restrictions, which basically say regular work with task rotation, claimant would suffer no loss of wage earning ability. She said task rotation was the nature of the job in the laundry at respondent, and claimant would be able to do her regular job.

Ms. Terrill stated that Dr. Fluter's restrictions place claimant at a sedentary capacity of work. In looking at jobs claimant could perform within those restrictions, she opined that claimant could perform the job of sewing machine operator earning, at the median, \$7.96 per hour or \$318.40 for a 40-hour week. Using a pre-injury average weekly wage (AWW) of \$435.46, claimant would have a 27 percent loss of wage earning ability.<sup>4</sup> Ms. Terrill also opined that claimant could perform the job of a document preparer. If she got a job in that field in the 10th percentile in the Wichita area, she could earn \$6.71 per hour or \$268.40 a week. This would compute to a 38 percent wage loss. However, she admitted that the wage she used in computing claimant's pre-injury AWW did not include any fringe benefits.

At the regular hearing, claimant testified that she continues to have pain in her thumbs, hands, wrists, elbows, shoulders, upper back, and neck. Since she left work at respondent, her pain has remained the same and has not decreased, although it has not increased.

As of the date of the regular hearing, claimant was receiving unemployment benefits. She admitted she had to state that she was able to work in order to receive those benefits and is also required to look for work. She submitted a list of 80 contacts she made in an effort to find employment between December 18, 2007, and April 18, 2008. She testified that she has had three interviews as a result of her job search but has not received an offer of employment.

#### **PRINCIPLES OF LAW**

K.S.A. 2008 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2008 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510d states in part:

(a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510h and 44-510i and amendments thereto, but shall not be entitled

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<sup>4</sup> The parties have stipulated that claimant's average weekly wage without fringe benefits was \$435.46, and she received fringe benefits of \$115.36 per week, making her average weekly wage, including fringe benefits, \$550.82. There was no evidence in the record setting out the date fringe benefits were terminated.

to any other or further compensation for or during the first week following the injury unless such disability exists for three consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, 66 2/3% of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, except that in no case shall the weekly compensation be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

(1) For loss of a thumb, 60 weeks.

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(11) For the loss of a hand, 150 weeks.

(12) For the loss of a forearm, 200 weeks.

(13) For the loss of an arm, excluding the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 210 weeks, and for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures, 225 weeks.

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(23) Loss of a scheduled member shall be based upon permanent impairment of function to the scheduled member as determined using the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

K.S.A. 44-510e(a) states in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In *Foulk*,<sup>5</sup> the Kansas Court of Appeals held:

The legislature clearly intended for a worker not to receive compensation where the worker was still capable of earning nearly the same wage. Further, it would be unreasonable for this court to conclude that the legislature intended to encourage workers to merely sit at home, refuse to work, and take advantage of the workers compensation system.

Later, in *Copeland*,<sup>6</sup> the Court of Appeals stated:

In attempting to harmonize the language of K.S.A. 44-510e(a) with the principles of *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995), the factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages can be made based on the actual wages.

The good faith of an employee's efforts to find or retain appropriate employment is determined on a case-by-case basis.<sup>7</sup>

The Kansas Court of Appeals in *Watson*<sup>8</sup> held the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.<sup>9</sup>

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<sup>5</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 284, 887 P.2d 140, (1994), *rev. denied* 257 Kan. 1091 (1995).

<sup>6</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, Syl. ¶ 7, 944 P.2d 179 (1997).

<sup>7</sup> *Parsons v. Seaboard Farms, Inc.*, 27 Kan. App. 2d 843, Syl. ¶ 3, 9 P.3d 591 (2000).

<sup>8</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

<sup>9</sup> *Id.* at Syl. ¶ 4.

Despite clear signals from recent decisions of the Kansas Supreme Court that the literal language of the statutes should be applied and followed whenever possible,<sup>10</sup> there has yet to be a specific repudiation of the good faith requirement by the Supreme Court. Absent an appellate court decision overturning *Copeland* and its progeny, the Board is compelled by the doctrine of *stare decisis* to follow those precedents. Consequently, in cases of permanent partial disability, the Board must look to whether claimant demonstrated a good faith effort post injury to perform the accommodated job with respondent and, thereafter, to find appropriate employment.

In *Casco*,<sup>11</sup> the Kansas Supreme Court stated:

*Pruter*<sup>12</sup> established the proper analysis for calculating compensation when the claimant has a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. The analysis begins with a determination of whether the claimant has suffered a permanent total disability. K.S.A. 44-510c(a)(2) establishes a rebuttable presumption in favor of permanent total disability when the claimant experiences a loss of both eyes, both hands, both arms, both feet, or both legs or any combination thereof. If the presumption is not rebutted, the claimant's compensation must be calculated as a permanent total disability in accordance with K.S.A. 44-510c. *Pruter*, 271 Kan. at 875-76.

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

When the injury suffered by a claimant is not an injury that raises a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2), the statute provides that in all other cases permanent total disability shall be determined in accordance with the

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<sup>10</sup> See *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), and *Graham v. Dokter Trucking Group*, 284 Kan. 547, 161 P.3d 695 (2007); *Gutierrez v. Dold Foods, Inc.*, \_\_ Kan. App. 2d \_\_, Syl. ¶ 5, 199 P.3d 798 (No. 99,535 filed January 16, 2009).

<sup>11</sup> *Supra* n. 10.

<sup>12</sup> *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.<sup>13</sup>

In *Wardlow*<sup>14</sup>, the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The court in *Wardlow* looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

### ANALYSIS

Claimant's bilateral upper extremity injuries give rise to a rebuttable presumption of a permanent total disability under *Casco*.<sup>15</sup> The presumption has not been rebutted.

When claimant returned to work with respondent in the laundry room job, she got worse. Ultimately, respondent terminated claimant's employment because she could no longer perform her job. Respondent was either unable or unwilling to accommodate claimant's restrictions. Dr. Fluter, claimant's authorized treating physician, diagnosed her with tendonitis and arthritis in her bilateral upper extremities, mild carpal tunnel syndrome on the right, and myofascial pain affecting her neck and upper back. Dr. Fluter also noted claimant had pain in both arms, thumbs, hands and wrists. He related her pain and other conditions to her work with respondent due to repetitive traumas. His permanent restrictions for claimant were that she restrict lifting, carrying, pushing, and pulling to 10 pounds occasionally and negligible weight frequently; activities at or above shoulder level using each arm to an occasional basis; repetitive flexion, extension, pronation, and supination of each elbow to an occasional basis; repetitive flexion and extension of each wrist to an occasional basis, and repetitive grasp using each hand to an occasional basis. He eliminated all but one task from the list of job tasks claimant had performed during the 15 years before her date of accident. Moreover, Dr. Fluter believed claimant would probably not be able to find a job within her restrictions given her education, age, and prior work experience. Mr. Hardin agreed with Dr. Fluter and opined that claimant was realistically unemployable.

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<sup>13</sup> *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

<sup>14</sup> *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

<sup>15</sup> *Supra* n. 10.

As did the ALJ, the Board finds the opinions of Dr. Fluter and Mr. Hardin to be more persuasive than the opinions of Dr. Melhorn and Ms. Terrill. Dr. Fluter treated claimant over a period of time, and his restrictions are consistent with claimant's symptoms and complaints. Based upon the standard enunciated by the Kansas Court of Appeals in *Wardlow*, claimant is permanently and totally disabled.

**CONCLUSION**

Claimant is entitled to an award based upon a permanent total disability.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated October 3, 2008, is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of March, 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Steven R. Wilson, Attorney for Claimant  
Joseph C. McMillan, Attorney for Self-Insured Respondent  
Thomas Klein, Administrative Law Judge